

## Update: Criminal Procedure Monograph 8—Felony Sentencing

### Part II—Scoring the Statutory Sentencing Guidelines

#### 8.6 Scoring an Offender’s Offense Variables (OVs)

##### G. OV 6—Intent to Kill or Injure Another Individual

###### 1. Special Instructions and Definitions

In *People v Drohan*, 475 Mich \_\_\_\_ (2006), the Michigan Supreme Court determined that Michigan’s sentencing scheme does not violate the Sixth Amendment. Therefore, beginning near the bottom of page 51 and continuing to the top of page 52, replace the **Note** with the following text:

**Note:** A trial court may properly consider information not proved beyond a reasonable doubt when scoring offense variables on which a defendant’s sentence is based. *People v Drohan*, 475 Mich \_\_\_\_, \_\_\_\_ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan’s sentencing scheme does not violate a defendant’s Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan, supra* at \_\_\_\_\_. The *Drohan* Court’s decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan’s indeterminate sentencing scheme. *Drohan, supra* at \_\_\_\_\_. According to the *Drohan* Court, Michigan’s sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury’s verdict—the statutory maximum. *Id.* at \_\_\_\_\_. The Court explained, “a defendant does not have a right to anything less than the maximum sentence authorized by the jury’s verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range.” *Id.* at \_\_\_\_ (citations omitted).

## Part II—Scoring the Statutory Sentencing Guidelines

### 8.6 Scoring an Offender's Offense Variables (OVs)

#### H. OV 7—Aggravated Physical Abuse

##### 2. Case Law Under the Statutory Guidelines

Insert the following text on page 53 before the first paragraph in this subsection:

Actual physical abuse is not necessary to score a defendant's conduct under OV 7. *People v Mattoon*, \_\_\_ Mich App \_\_\_, \_\_\_ (2006). In *Mattoon*, the defendant was convicted of various crimes related to an episode in which he held his girlfriend at gunpoint for nine hours. Apparently, no actual physical abuse was involved in the incident. Because the trial court concluded that actual physical abuse was required to score a defendant's conduct under OV 7, the court scored the offense variable at zero points. *Id.* at \_\_\_.

The *Mattoon* Court examined the plain language of MCL 777.37 (OV 7) and concluded that the Legislature did not intend that actual physical abuse be required to support an OV 7 score.\* *Mattoon, supra* at \_\_\_. According to the Court:

“While the label of OV 7 is ‘aggravated physical abuse,’ when the section is read as a whole, the Legislature does not require actual physical abuse in order for points to be assessed under this variable. Specifically, subsection (3) defines ‘sadism’ to mean ‘conduct’ that, among other things, subjects the victim to extreme or prolonged humiliation. While humiliation may have a physical component, there certainly does not have to be physical abuse in order to produce humiliation. Emotional or psychological abuse can certainly have that effect as well. If the Legislature intended to limit the applicability of OV 7 to cases where there is physical abuse, then instead of defining ‘sadism’ to be ‘conduct’ that produces pain or humiliation, it would have said ‘physical abuse’ that subjects the victim to pain or humiliation.” *Id.* at \_\_\_.

\*The Court noted that the OV 7 score in *People v Hornsby*, 251 Mich App 462 (2001), discussed below, was based on conduct involving no actual physical contact.

## Part II—Scoring the Statutory Sentencing Guidelines

### 8.6 Scoring an Offender's Offense Variables (OVs)

#### M. OV 12—Contemporaneous Felonious Criminal Acts

##### 2. Case Law Under the Statutory Guidelines

In *People v Drohan*, 475 Mich \_\_\_\_ (2006), the Michigan Supreme Court determined that Michigan's sentencing scheme does not violate the Sixth Amendment. Therefore, replace the **Note** on page 68 with the following text:

**Note:** A trial court may properly consider information not proved beyond a reasonable doubt when scoring offense variables on which a defendant's sentence is based. *People v Drohan*, 475 Mich \_\_\_\_, \_\_\_\_ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan's sentencing scheme does not violate a defendant's Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan, supra* at \_\_\_\_\_. The *Drohan* Court's decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan's indeterminate sentencing scheme. *Drohan, supra* at \_\_\_\_\_. According to the *Drohan* Court, Michigan's sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury's verdict—the statutory maximum. *Id.* at \_\_\_\_\_. The Court explained, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Id.* at \_\_\_\_ (citations omitted).

## Part V—The Sentencing Hearing

### 8.24 Crime Victim's Impact Statement

In *People v Drohan*, 475 Mich \_\_\_\_ (2006), the Michigan Supreme Court determined that Michigan's sentencing scheme does not violate the Sixth Amendment. Therefore, replace the **Note** beginning near the bottom of page 125 and continuing on page 126 with the following text:

**Note:** A trial court may properly consider information not proved beyond a reasonable doubt when determining the length of a defendant's sentence. *People v Drohan*, 475 Mich \_\_\_\_, \_\_\_\_ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan's sentencing scheme does not violate a defendant's Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan, supra* at \_\_\_\_\_. The *Drohan* Court's decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan's indeterminate sentencing scheme. *Drohan, supra* at \_\_\_\_\_. According to the *Drohan* Court, Michigan's sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury's verdict—the statutory maximum. *Id.* at \_\_\_\_\_. The Court explained, “a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range.” *Id.* at \_\_\_\_ (citations omitted).

## Part VI—Fashioning an Appropriate Sentence

### 8.26 Scope and Objectives

In *People v Drohan*, 475 Mich \_\_\_\_ (2006), the Michigan Supreme Court determined that Michigan’s sentencing scheme does not violate the Sixth Amendment. Therefore, replace the **Note** beginning near the bottom of page 127 and continuing on page 128, with the following text:

**Note:** A trial court may properly consider information not proved beyond a reasonable doubt when determining the length of a defendant’s sentence. *People v Drohan*, 475 Mich \_\_\_\_, \_\_\_\_ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan’s sentencing scheme does not violate a defendant’s Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan, supra* at \_\_\_\_\_. The *Drohan* Court’s decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan’s indeterminate sentencing scheme. *Drohan, supra* at \_\_\_\_\_. According to the *Drohan* Court, Michigan’s sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury’s verdict—the statutory maximum. *Id.* at \_\_\_\_\_. The Court explained, “a defendant does not have a right to anything less than the maximum sentence authorized by the jury’s verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range.” *Id.* at \_\_\_\_ (citations omitted).

## Part VI—Fashioning an Appropriate Sentence

### 8.26 Scope and Objectives

#### A. Intermediate Sanctions

Insert the following text on page 128 after the third paragraph in this subsection:

**Note:** Whether a trial court may depart from the sentences indicated when an offender's OV and PRV levels place the offender in an intermediate sanction cell has not yet been decided by the Michigan Supreme Court. *People v McCuller*, 475 Mich \_\_\_, \_\_\_ (2006). In *McCuller*, this issue was before the Court but escaped review because the *McCuller* defendant was not entitled to an intermediate sanction once his offense variables were properly scored. *Id.* at \_\_\_.

## Part VI—Fashioning an Appropriate Sentence

### 8.30 Additional Information to Consider Before Imposing Sentence

#### B. Improper Considerations

In *People v Drohan*, 475 Mich \_\_\_\_ (2006), the Michigan Supreme Court determined that Michigan’s sentencing scheme does not violate the Sixth Amendment. Therefore, replace the **Note** on page 146 with the following text:

**Note:** A trial court may properly consider information not proved beyond a reasonable doubt when determining the length of a defendant’s sentence. *People v Drohan*, 475 Mich \_\_\_\_, \_\_\_\_ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan’s sentencing scheme does not violate a defendant’s Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan, supra* at \_\_\_\_\_. The *Drohan* Court’s decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan’s indeterminate sentencing scheme. *Drohan, supra* at \_\_\_\_\_. According to the *Drohan* Court, Michigan’s sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury’s verdict—the statutory maximum. *Id.* at \_\_\_\_\_. The Court explained, “a defendant does not have a right to anything less than the maximum sentence authorized by the jury’s verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range.” *Id.* at \_\_\_\_ (citations omitted).

## Part VIII—Specific Types of Sentences

### 8.43 Youthful Trainee Act—Deferred Adjudication

Insert the following text immediately before Section 8.44 at the bottom of page 191:

See also *People v Giovannini*, \_\_\_ Mich App \_\_\_, \_\_\_ (2006), where the Court of Appeals held that a “defendant was not ineligible for sentencing under the [youthful trainee act] solely because he was convicted of two criminal offenses.” The Court explained: “Interpreting MCL 762.11 to permit placement under the [youthful trainee act] only in cases involving a single offense would work contrary to the discretion invested in the trial court and to the overall purpose of the act.” *Giovannini*, *supra* at \_\_\_.



## Part X—Selected Post-Sentencing Issues

### 8.53 Probation Revocation

Insert the following text before the last full paragraph on page 218:

See also *People v Church*, \_\_\_ Mich \_\_\_ (2006), where the Michigan Supreme Court reiterated its holding in *People v Hendrick*, 472 Mich 555, 560 (2005), that the statutory sentencing guidelines apply to sentences imposed after probation revocation. In *Church*, the Court issued a peremptory order vacating the sentences imposed on a defendant after his probation was revoked and remanding the case to the trial court for resentencing. The order, in part, stated the following:

“The sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 560 (2005). Defendant’s minimum sentencing guidelines range is 7 to 23 months. The trial court did not articulate substantial and compelling reasons for imposing a minimum sentence of 40 months. On remand, the trial court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). Under *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart.” *Church*, *supra* at \_\_\_.

## Part X—Selected Post-Sentencing Issues

### 8.53 Probation Revocation

Insert the following text before the **Note** on page 220:

See also *People v Church*, \_\_\_ Mich \_\_\_ (2006), where the Michigan Supreme Court reiterated its holding in *People v Hendrick*, 472 Mich 555, 560 (2005), that the statutory sentencing guidelines apply to sentences imposed after probation revocation. In *Church*, the Court issued a peremptory order vacating the sentences imposed on a defendant after his probation was revoked and remanding the case to the trial court for resentencing. The order, in part, stated the following:

“The sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 560 (2005). Defendant’s minimum sentencing guidelines range is 7 to 23 months. The trial court did not articulate substantial and compelling reasons for imposing a minimum sentence of 40 months. On remand, the trial court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). Under *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart.” *Church*, *supra* at \_\_\_.